

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BRIAN KERRY O'KEEFE,

Case No. 3:14-cv-00477-RCJ-CLB

Petitioner

Order

v.

BRIAN E. WILLIAMS, et al.,

Respondents.

I. Introduction

This court denied Brian Kerry O'Keefe's habeas corpus petition on October 16, 2019, and judgment was entered. (ECF Nos. 131, 132.) O'Keefe appealed, and the Ninth Circuit Court of Appeals denied a certificate of appealability. (ECF Nos. 133, 136, 137.) O'Keefe moved for relief from judgment under Fed. R. Civ. P. 60(b) on October 7, 2020. (ECF No. 138.) This court denied the motion and granted the respondents' request that they be relieved from responding to O'Keefe's future pleadings unless a response was directed by this court. (ECF No. 146.)

O'Keefe has again moved for relief from judgment under Fed. R. Civ. P. 60(b). (ECF Nos. 148, 149.) O'Keefe alleges that a new rule of constitutional law, *Borden v. United States*, 141 S.Ct. 1817 (2021), applies retroactively and relates back to Grounds 3, 4, and 5 of his federal habeas petition. (ECF No. 149 at 1.)

II. Background

Grounds 3, 4, and 5 of O'Keefe's petition alleged, respectively, that his right to be free from double jeopardy was violated, the state district court improperly denied his proposed malignant heart jury instruction, and he was actually innocent. (ECF No. 50 at 43, 56-57, 62.) This

1 court dismissed Ground 5 because it was “either subsumed within or duplicative of his double
2 jeopardy claim set forth in ground 3.” (ECF No. 106 at 6.) This court then determined that Grounds
3 3 and 4 lacked merit, respectively, because the State was not prohibited from retrying O’Keefe
4 after his conviction was reversed due to a trial error and Jury Instruction No. 5, which was used
5 over O’Keefe’s proposed jury instruction, was proper. (ECF No. 131 at 15-16, 23.)

6 O’Keefe was convicted of second-degree murder with the use of a deadly weapon for
7 stabbing and killing Victoria Whitmarsh. (ECF Nos. 61, 63-29, 76-7.) O’Keefe explains that he
8 was convicted of second-degree murder because he acted recklessly, but the United States
9 Supreme Court clarified in *Borden* that a violent felony cannot be predicated on mere reckless
10 conduct. (ECF No. 149 at 3, 7.) Rather, O’Keefe would have had to have acted with a deliberate
11 choice to harm to be convicted of second-degree murder. (*Id.* at 7.) However, O’Keefe argues that
12 he lacked this requisite intent because he was too intoxicated at the time of the killing. (*Id.* at 10.)

13 **III. Discussion**

14 Fed. R. Civ. P. 60(b) entitles the moving party to relief from judgment on several grounds,
15 including the catch-all category “any other reason that justifies relief.” Fed. R. Civ. P. 60(b)(6).
16 Fed. R. Civ. P. 60(b) applies in habeas corpus proceedings only to the extent that it is not
17 inconsistent with the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA).
18 *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005). AEDPA generally precludes “second or successive
19 habeas corpus applications” unless the petitioner meets certain narrow requirements. *See* 28 U.S.C.
20 § 2244(b).

21 In *Gonzalez*, the Supreme Court held that a legitimate Fed. R. Civ. P. 60(b) motion in a
22 habeas action “attacks . . . some defect in the integrity of the federal habeas proceedings,” while a
23 second or successive habeas corpus petition “is a filing that contains one or more ‘claims,’” defined

1 as “asserted federal bas[e]s for relief from a state court’s judgment of conviction.” *Gonzalez*, 545
2 U.S. at 530, 532. This court is not convinced that O’Keefe’s motion is a legitimate Fed. R. Civ. P.
3 60(b) motion; instead, it appears, pursuant to *Gonzalez*, to be a second or successive habeas corpus
4 petition, which is proscribed under AEDPA. *See id.* at 532 (explaining that a Fed. R. Civ. P. 60(b)
5 “motion based on a purported change in the substantive law governing the claim . . . would
6 impermissibly circumvent the requirement that a successive habeas petition be precertified by the
7 court of appeals as falling within an exception to the successive-petition bar”).

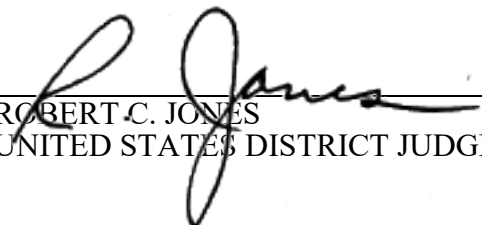
8 And even if O’Keefe’s motion was a legitimate Fed. R. Civ. P. 60(b)(6) motion, O’Keefe
9 would have to demonstrate that the change in the law discussed in *Borden* rises to the level of
10 “extraordinary circumstances” justifying relief. *Gonzalez*, 545 U.S. at 535. In *Borden*, the United
11 States Supreme Court held that a reckless offense cannot qualify as a “violent felony” under the
12 Armed Career Criminal Act, 18 U.S.C. § 924(e), which mandates a 15-year sentence for persons
13 found guilty of illegally possessing a gun who have three or more prior convictions for a “violent
14 felony.” 141 S.Ct. at 1821-22. *Borden* is not applicable here.

15 **IV. Conclusion**

16 IT IS THEREFORE ORDERED that the motion for relief from judgment [ECF No. 148]
17 and amended motion for relief from judgment [ECF No. 149] are DENIED.

18 IT IS FURTHER ORDERED that, because reasonable jurists would not find this decision
19 to be debatable or wrong, a certificate of appealability is DENIED.

20 DATED: January 14, 2022.

21 
22 ROBERT C. JONES
23 UNITED STATES DISTRICT JUDGE